PP

v.

DATO' WAAD MANSOR

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
SITI NORMA YAAKOB FCJ
ALAUDDIN MOHD SHERIFF FCJ
[CRIMINAL APPEAL NO: 05-21-2003 (N)]
4 JANUARY 2005

CRIMINAL LAW: *Emergency (Essential Powers) Ordinance No 22 of 1970 - Section 2(1) - Corrupt practice - Accused politician took part in decisions to approve application for quarry land made by company in which he had interest - Whether an abuse of office - Whether use of public position for pecuniary advantage - Whether there was premeditation to commit corrupt act - Whether sentence imposed by Court of Appeal inadequate to reflect gravity of offence*

The accused was a member of the State Legislative Assembly, a member of the State Executive Council, and a member of the Tampin District Land Committee in the state of Negeri Sembilan. He was acquitted and discharged on three amended charges for the offences of corrupt practice under s. 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance'). He allegedly used his political position by taking part in decisions, *inter alia*, to approve an application for quarry land by a company called Teraju Nusantara Sdn Bhd ('the company') in which he had an interest. The Public Prosecutor appealed against the acquittal of the accused and the Court of Appeal ('CA') allowed the appeal convicting the accused on the amended charges and sentencing him to a fine of RM15,000 in default six months' imprisonment on each amended charge. The Public Prosecutor unhappy with the sentence imposed appealed to this court for a heavier sentence to reflect the gravity of the offences for which the accused was charged and convicted.

Held (allowing the appeal)
Per Alauddin Mohd Sheriff FCJ delivering the judgment of the court:

[1] The formation of the company to the subsequent approval of its application for quarry operations was done over a very short period of time. Further, the company was a RM3 company and the directors

were not business-oriented people with the necessary expertise in quarry works. Against this backdrop, the CA had given very little attention to the insiduous conduct of the accused in respect of his role in the entire episode. His role began with the inception of the company and concluded with its sale thereof. By merely focusing on the initial presence of the accused at the relevant meetings in his political capacity, the CA viewed the offences in a very cursory manner. The effect of the accused's conduct was more visible when viewed in its totality. (p 431 e-h)

[2] The presence of the accused at the relevant meetings was part of his nefarious design and was not adequately considered by the CA when assessing sentence. The accused was paid RM150,000 and his wife RM100,000. The role of the accused stretched far beyond merely participating in the decision-making process for the application for quarry land. (p 432 a, f)

[3] There was not an iota of evidence to suggest that the company's application would have been approved without the presence of the accused. The view of the CA that the application would have been approved anyway was a mere conjecture on its part. It was not for this court to speculate if such remarks erroneously influenced the CA when deciding on the sentence. (p 433 a)

[4] The distinction drawn by the CA in the case of *PP v. Dato Seri Anwar Ibrahim* and that of the present case was incorrect. The CA failed to consider that both cases involved the abuse of office or powers of members of the administration or public officers. The very purpose for which the Ordinance is designed is to curb corrupt practices of members of the administration that can by itself threaten the security of the country. Every form of corrupt practice that falls within the definition of the Ordinance is a threat to national security. Hence, the conduct of the accused and his conviction of the charges under the Ordinance are *ipso facto* threats to the security of the country even though they are not threats to public order, a factor which was overlooked by the CA. (p 433 b-e)

[5] Any offence, be it murder, rape, robbery or corruption is an offence against society and the community at large. By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery and criminal breach of trust, etc, the CA underplayed the effect of corruption in this society. The offence of corruption, if unabated, is far more reaching in consequences than crimes of robbery, criminal breach of trust or rape. Therefore, the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences. (p 434 b-c)

[6] From the sequence of events that took place, it was obvious that it was a well-thought scheme by the accused. There was clear evidence of premeditation on his part to commit a corrupt act. The offence was not committed in a moment of aberration or on the spur of the moment. The parts played by the accused showed in no uncertain terms that financial advantage was foremost in his mind. (p 440 b-d)

[7] The CA placed very little emphasis on the principles of sentencing but placed much emphasis on the fact that the accused's political career was destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. These were by no means extenuating circumstances attracting sympathy. They were in fact considerations that the accused should have had in mind before embarking on his nefarious scheme. They certainly should not have an overwhelming effect on the sentencing process. The authorities show that in cases involving corruption, imprisonment is a proper sentence unless there are extenuating circumstances against the imposition of such a sentence in which case there were none herein. (pp 440 h & 441 a, c-e)

[Sentences of fine imposed by CA substituted with sentence of two years' imprisonment on each amended charge to run concurrently.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Tertuduh adalah seorang ahli Badan Perundangan Negeri, ahli Majlis Mesyuarat Kerajaan Negeri dan ahli Majlis Tanah Daerah Tampin di Negeri Sembilan. Beliau telah dilepas dan dibebaskan dari tiga pertuduhan terpinda bagi kesalahan rasuah di bawah s. 2(1) Ordinan Darurat (Kuasa-Kuasa Khas) No. 22 Tahun 1970 ('Ordinan'). Beliau dikatakan telah menggunakan kedudukan politik beliau dengan mengambil bahagian dalam membuat keputusan-keputusan, antara lain, untuk meluluskan permohonan bagi tanah

kuari yang dibuat oleh sebuah syarikat bernama Teraju Nusantara Sdn Bhd ('syarikat') dalam mana beliau mempunyai kepentingan tertentu. Pendakwa Raya merayu terhadap pembebasan tertuduh dan Mahkamah Rayuan ('MR'), dalam membenarkan rayuan, telah mensabitkan tertuduh atas pertuduhan terpinda dan menjatuhkan hukuman denda RM15,000 jika gagal bayar enam bulan penjara bagi setiap pertuduhan terpinda. Pendakwa Raya, yang tidak berpuas hati dengan hukuman yang dijatuhkan, merayu ke mahkamah semasa untuk hukuman yang lebih berat sesuai dengan kesalahan berat yang tertuduh didapati bersalah.

Diputuskan (membenarkan rayuan)

Oleh Alauddin Mohd Sheriff HMP menyampaikan penghakiman mahkamah:

[1] Pembentukan syarikat selepas permohonan untuk operasi kuarinya diluluskan dibuat dalam tempoh yang amat singkat. Selain itu, syarikat adalah sebuah syarikat RM3 dan pengarah-pengarahnya bukan orang yang arif dalam perniagaan atau mempunyai kepakaran dalam kerja-kerja kuari. Mengambil kira latarbelakang ini, MR memberi perhatian yang amat sedikit kepada kelakuan tersembunyi tertuduh berkaitan peranan yang dimainkan oleh beliau dalam keseluruhan episod. Peranannya bermula dengan pembentukan syarikat dan berakhir dengan penjualannya. Dengan hanya menumpu kepada kehadiran awal tertuduh dalam kapasiti politiknya di mesyuarat-mesyuarat yang relevan, MR hanya menilai kesalahan-kesalahan yang dilakukan dengan sepintas lalu. Kesan kelakuan tertuduh akan lebih terserlah apabila ia dilihat secara keseluruhan.

[2] Kehadiran tertuduh pada mesyuarat-mesyuarat yang relevan adalah sebahagian dari rancangan jahatnya yang mana ini tidak dipertimbang oleh MR apabila meneliti soal hukuman. Tertuduh telah dibayar RM150,000 dan isterinya pula RM100,000. Peranan tertuduh bukan semata-mata mengambil bahagian dalam proses membuat keputusan bagi permohonan tanah kuari tetapi menjangkau jauh melepasi had tersebut.

[3] Tidak terdapat sebarang keterangan walaupun sebesar zarah yang menunjukkan bahawa permohonan syarikat akan diluluskan tanpa kehadiran tertuduh. Pandangan MR bahawa permohonan akan diluluskan juga sama ada tertuduh hadir atau tidak adalah sangkaan mahkamah tersebut semata-mata. Mahkamah ini bagaimanapun tidak berhasrat untuk membuat andaian sama ada kenyataan itu telah dengan salah mempengaruhi MR apabila memutuskan tentang hukuman.

[4] Perbezaan yang dibuat oleh MR di antara kes *Dato' Seri Anwar Ibrahim* dan kes semasa adalah tidak betul. MR gagal melihat bahawa kedua-dua kes melibatkan salah guna jawatan atau kuasa oleh ahli-ahli badan pentadbiran atau pegawai-pegawai awam. Ordinan digubal dengan tujuan khusus untuk menghalang amalan-amalan rasuah oleh penjawat-penjawat awam yang boleh menggugat keselamatan negara. Setiap bentuk amalan rasuah yang terangkum ke dalam definasi Ordinan adalah ancaman kepada keselamatan negara. Maka itu, perbuatan tertuduh dan sabitannya terhadap pertuduhan-pertuduhan di bawah Ordinan adalah *ipso facto* ancaman kepada keselamatan negara, walaupun ianya bukan ancaman kepada ketenteraman awam. Faktor ini gagal diambil kira oleh MR.

[5] Mana-manapun kesalahan, sama ada kesalahan bunuh, rogol, rompak ataupun rasuah, adalah kesalahan terhadap masyarakat. Dengan mengatakan bahawa kesalahan rasuah adalah suatu kesalahan dalam kelasnya yang tersendiri yang tidak boleh disamakan dengan jenayah-jenayah kejam lain seperti bunuh, rogol, rompak, pecah amanah jenayah dll, MR, sebenarnya, telah memperkecilkan bahana rasuah kepada masyarakat. Kesalahan rasuah, jika tidak dibendung, boleh memberi kesan yang jauh lebih menyeluruh berbanding dengan jenayah-jenayah rompak, pecah amanah ataupun rogol. Oleh yang demikian, hukuman yang harus dijatuhkan terhadap kesalahan rasuah perlu bersifat mencegah bagi mencerminkan beratnya kesalahan itu.

[6] Dari rentetan peristiwa yang berlaku, jelas bahawa peristiwa-peristiwa tersebut memang dirancang oleh tertuduh. Terdapat keterangan jelas mengenai niatnya untuk melakukan perbuatan rasuah. Kesalahan tidak dilakukan disebabkan oleh halkeadaan luar biasa, ataupun secara spontan. Tidak syak lagi, melihat kepada peranan yang dimainkan oleh tertuduh, bahawa faktor kewangan menjadi pertimbangan utamanya.

[7] MR memberi tekanan yang amat sedikit kepada prinsip-prinsip hukuman, sebaliknya memberi tumpuan yang lebih kepada fakta bahawa karier politik tertuduh akan berkubur, bahawa jawatan-jawatan yang dipegang beliau sebelumnya akan hilang mungkin buat selama-lamanya, dan bahawa nama baik beliau telahpun musnah. Ini bukanlah faktor-faktor yang harus diberikan simpati. Faktor-faktor tersebut adalah perkara-perkara yang tertuduh sepatutnya memberi pertimbangan sebelum memulakan rancangan jahatnya. Faktor-faktor ini tidak sepatutnya memberi kesan mendalam terhadap proses penghukuman. Autoriti-autoriti menunjukkan bahawa, dalam kes-kes rasuah,

pemenjaraan adalah hukuman yang sesuai kecuali jika terdapat keadaan-keadaan yang tidak mengharuskannya, keadaan mana tidak wujud dalam kes di sini.

[Hukuman denda yang dikenakan oleh Mahkamah Rayuan digantikan dengan hukuman penjara dua tahun bagi setiap pertuduhan terpinda untuk berjalan bersama.]

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 230 ***(refd)***
Kang Yeow Hooi & Ors v. PP [1954] 20 MLJ 233 ***(refd)***
Lim Poh Tee v. PP [2001] 1 SLR 674 ***(refd)***
Nunis v. PP [1982] 2 MLJ 114 ***(foll)***
PP v. Dato' Hj Mohamed Muslim Hj Othman [1983] 1 MLJ 245 ***(foll)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(foll)***
PP v. Datuk Hj Sahar Arpan [1999] 3 CLJ 427 HC ***(refd)***
PP v. Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
R v. Sargent [1974] 60 Cr App R 74 ***(refd)***

Legislation referred to:
Emergency (Essential Powers) Ordinance No 22 of 1970, s. 2(1)

For the appellant - Abdul Karim Abdul Jalil SFC
For the respondent - Amir Ismail; M/s Halim & Ismail

Reported by Usha Thiagarajah

JUDGMENT

Alauddin Mohd Sheriff FCJ:
At the High Court in Seremban, the respondent faced three amended charges for offences under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 ("the Ordinance").

The charges read as follows:

1st Amended Charge

That you on the 21st December 1992 at about 10.00 am at Bilik Gerakan, Tampin District Office, in the State of Negeri Sembilan, being a member of the State Legislative Assembly Gemencheh, Tampin committed corrupt practice by using your public position for your pecuniary advantage in that you did take part in a decision of the District of Tampin Land Committee

in which you had an interest, to wit deciding that the application by Syarikat Teraju Nusantara Sdn. Bhd. to acquire State land at Mukim of Repah, in the District of Tampin comprising of about 20.146 hectares by way of Temporary Occupation Licence (TOL) with permit and 4 hectares by way of alienation for quarry industries in an application file PTT 1/2/545 be forwarded to the Negeri Sembilan State Executive Council with a recommendation for approval and that you have thereby committed an offence punishable under Section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.

2nd Amended Charge

That you on 28th April 1993, at about 10.00 am at Bilik Mesyuarat Majlis Mesyuarat Kerajaan Negeri, in the District of Seremban, in the State of Negeri Sembilan, whilst being a member of the administration, namely a member of the State Executive Council Negeri Sembilan committed corrupt practice by using your public position for your pecuniary advantage in that you did take part in a decision of the said State Executive Council in which you had an interest, to wit the decision to approve alienation of a land by way of State lease for a period of 60 years comprising of about 28.24 hectares in the application file No. PTT 1/2/545 for the purpose of quarry industries to Syarikat Teraju Nusantara Sdn. Bhd., in Mukim Repah, in the District of Tampin and that you have thereby committed an offence punishable under Section 2(1) of the Emergency Ordinance (Essential Powers) Ordinance No 22 of 1970.

3rd Amended Charge

That you on the 26th January 1994, at about 10.00 am at Bilik Mesyuarat Majlis Mesyuarat Kerajaan Negeri, in the District of Seremban, in the State of Negeri Sembilan, whilst being a member of the Administration, namely a member of the State Executive Council of Negeri Sembilan, committed corrupt practice by using your public position for your pecuniary advantage in that you did take part in a decision of the said State Executive Council in which you had an interest, to wit the decision to approve the application for extension of time for the payment of premium for another 6 months for the land comprising of about 28.24 hectares in the application file No. PTT 1/2/545 in Mukim Repah, in the District of Tampin, that have been approved to Syarikat Teraju Nusantara Sdn. Bhd. on 28th April 1993, and that you have thereby committed an offence punishable under Section 2(1) of the Emergency Ordinance (Essential Powers) Ordinance No 22 of 1970.

At the close of the case for the defence, the learned High Court Judge ("HCJ") acquitted and discharged the respondent on all the three amended charges.

The Public Prosecutor ("PP") appealed to the Court of Appeal ("CA") against the above orders of acquittal and discharge.

The CA allowed the PP's appeal and convicted the respondent on all three amended charges. The respondent was sentenced to a fine of RM15,000 in default six month's imprisonment on each amended charge.

This is an appeal by the PP against the sentences imposed by the CA.

Briefly, the facts of this case are as follows:

The respondent, having first won a by-election and subsequently the general election, was elected as a member of the Dewan Undangan ("ADUN") Negeri Sembilan on 22 May 1982. In 1986, the respondent was appointed as a member of the Majlis Mesyuarat Kerajaan ("MMK") Negeri Sembilan. In the series of general elections that followed, the respondent was returned as an ADUN and retained his appointment as the member of the MMK until the amended charges were brought against him. At all relevant times, however, the respondent was an ADUN, a member of the MMK, and the Tampin District Land Committee.

He was married to Noraini bt. Abdul Satar ("Noraini") on 26 June 1981 and she remained his wife at all relevant times.

On 4 November 1991, Syarikat Teraju Nusantara Sdn. Bhd. ("Teraju Nusantara") was set up by Abdul Wahab bin Ahmad ("Wahab"), Noraini and Milah bt. Haron ("Milan"). Each of them held a share of RM1. All the three were directors of Teraju Nusantara. Milah is the wife of one Ismail bin Maarof, a draftsman at the Tampin District Land Office. Wahab is a teacher and also the senior assistant headmaster attached to the Sekolah Kebangsaan Gemencheh where Noraini was also teaching.

On 25 November 1991, about three weeks after Teraju Nusantara was set up, the company applied to the Tampin District Land Administrator for quarry land, the subject matter of the amended charges.

Working papers concerning the application were prepared on 15 December 1992 and on 21 December 1992, they were tabled before the Land Committee meeting. They were considered and recommended for approval by the MMK. The respondent attended the meeting.

On 28 April 1993, the MMK approved the said application. The respondent also attended the meeting.

On 26 January 1994, the MMK approved an application by Teraju Nusantara for an extension of time to pay the premium on the said land. The respondent also attended this meeting. It would be observed that all the three dates mentioned above correspond with the dates mentioned in the charges.

On 19 May 1994, the respondent, Noraini, Wahab, Milan and her husband Ismail were brought by one Teoh Song Chuah to see Dato' Rosie Tan at her office at Hotel Pan Pacific Kuala Lumpur. Teoh Song Chuah is the Senior Manager (Treasury) of Tan Chong Motors and Dato' Rosie Tan is his superior officer at Tan Chong Motors. Dato' Rosie Tan is also the 'financier' of Syarikat Hanro Bina Sdn. Bhd. ("Hanro Bina").

The purpose of the meeting was to discuss matters pertaining to the sale of the quarry land from Teraju Nusantara to Hanro Bina. Hanro Bina agreed to buy the said land for RM1.1 million.

At the said meeting, Dato' Rosie Tan paid RM150,000 to the respondent and RM100,000 to Noraini. Wahab and Milan each received RM50,000.

Before the said meeting, the respondent, Wahab, Ismail and Dato' Rosie Tan had visited the said land.

On 19 July 1994, an agreement was entered into between Hanro Bina and Noraini, Wahab and Milah for the sale of their shares in Teraju Nusantara to Hanro Bina. Noraini signed the said agreement.

The learned HCJ accepted all the above facts but he, nevertheless, acquitted and discharged the respondent on all the three amended charges. His sole reason for doing so was because he accepted the respondent's defence that when he (respondent) attended all the three meetings, he honestly believed that his wife, Noraini, had extinguished all her interest in Teraju Nusantara. This, according to the learned judge, had raised a reasonable doubt on the prosecution's case.

As stated earlier, the CA allowed the PP's appeal and convicted the respondent on all the three amended charges and sentenced him to a fine of RM15,000 in default six months imprisonment on each amended charge.

The learned Deputy Public Prosecutor ("DPP"), appearing on behalf of the appellant in this appeal before us, argued that the sentences imposed by the CA were manifestly and grossly inadequate against the proved facts and circumstances of this case. He had urged upon this court to interfere with the sentences imposed and substitute them with sentences that reflect the gravity of the offences for which the respondent was charged and convicted.

It was further submitted by the learned DPP that the CA had failed to appreciate the material put before them. As such the CA made a wrong decision as to the proper factual basis for sentence. The sentences were, therefore, wrong in principle in that they were manifestly inadequate. The CA had also erred in not appreciating that public interest would not be served by the mere imposition of a fine only for each amended charge.

It was submitted by learned counsel for the respondent that the fine of RM15,000 per amended charge which represented three quarters of the maximum fine permissible under the section was apt, correct and reasonable under the circumstances.

Learned counsel further argued that under s. 2(1) of the Ordinance, a custodial sentence is not mandatory. The CA, according to learned counsel, had applied the correct principles of sentencing taking into consideration all the circumstances of the case against the respondent.

Learned counsel further contended that the CA had taken into account public interest when imposing the sentences and they were correct in their finding that differences in opinion would necessarily arise in the application of its principles.

To fully understand and appreciate this appeal in its proper perspective, we feel it is imperative that we highlight the salient aspects of the judgment of the CA in respect of the offences against the respondent.

From the facts, the CA agreed that Teraju Nusantara was established on 4 November 1991, for one purpose and one purpose only ie, to secure the said land, the subject matter of the amended charges, for quarry operations. The presence of the respondent's wife as the director of Teraju Nusantara was indeed a camouflage for the respondent's involvement in the said company.

Immediately three weeks after the formation of Teraju Nusantara ie, on 25 November 1991, an application was made by it to the Land Office Tampin to develop the said land for quarry operations. The application was processed by the Land Administrator of the District of Tampin for the purpose of presenting it to the District Land Committee for consideration. The respondent, being an ADUN, was appointed as a member of the said Committee.

The working papers were prepared on 15 December 1992 and six days later, ie, on 21 December 1992, they were presented, considered and approved by the Committee with a positive recommendation to the MMK. The respondent was present at the Committee's meeting.

On 28 April 1993, the MMK approved the application of Teraju Nusantara to conduct quarry operations on the said land. The respondent, as a member, was once again present at the meeting.

On 26 January 1994, the MMK approved Teraju Nusantara's application for an extension of time to pay the premium for the said land. Here again, the respondent being one of the members, was present at the meeting.

From the chronology of events that had taken place, it can be seen that the entire exercise ie, from the formation of Teraju Nusantara to the subsequent approval of its application for quarry operations, was done over a very short period of time.

It must also be noted that the company was a RM3 company and the directors as such were not business oriented people with the necessary expertise in quarry works.

Against this background, we must say that the CA had, with respect, given very little attention to the insidious conduct of the respondent in respect of his role in the entire episode.

It is our view that we should look at the conduct of the respondent right from the inception of Teraju Nusantara to its eventual sale in order to understand the corrupt intention.

By merely focusing on the initial presence of the respondent at the various committee meetings in his capacity as the ADUN or member of the MMK, the CA, in our opinion, had viewed the offences in a very cursory manner. The effect of the respondent's conduct becomes more visible when viewed in its totality.

The presence of the respondent at the meeting of the MMK held on 26 January 1994, which deliberated on the extension of time for Teraju Nusantara to pay the premiums on the said land, was again part of his nefarious design which had not been adequately considered by the CA when assessing sentence.

In their judgment appearing at p. 15 of vol. 1 of the Appeal Record this is what the CA said:

> Memohon tanah kuari itu tidak salah. (Kalau itu salah, Majlis Mesyuarat Kerajaanlah yang patut dipersalahkan). Yang salahnya, walaupun bunyinya hebat iaitu "melakukan perbuatan rasuah", sebenarnya ialah kerana beliau berada dalam bilik mesyuarat itu semasa permohonan itu dipertimbangkan dan diluluskan. Permohonan itu boleh diluluskan tanpa kehadirannya dan dalam keadaan itu, kelulusan di perolehi juga dan beliau tidak bersalah.

In English

> Applying for the quarry land is not wrong. (If it is wrong, then the State Executive Council should be blamed). The mistake, although it sounds grave that is "committing a corrupt act", is actually because he was in the meeting room while the application was considered and approved. The application may be approved without his presence and in that circumstance, the approval was still obtained and he was not committing any offence.

The above quoted passage once again reflects the simplistic view taken by the CA in approaching the matter. With respect, the CA in the above passage is indeed minimizing the role played by the respondent. We must reiterate that the respondent's role began with the inception of Teraju Nusantara, and concluded with the sale of it on 19 July 1994. Prior to the execution of the sale and purchase agreement, the respondent was paid RM150,000 and his wife RM100,000. To our minds, the role of the respondent stretches far beyond merely participating in the decision making process in relation to the said land.

By the phrase "Permohonan itu boleh diluluskan tanpa kehadirannya dan dalam keadaan itu, kelulusan diperolehi juga dan beliau tidak bersalah" (The application may be approved without his presence and in that circumstance, the approval was still obtained and he was not committing any offence), would mean that the CA was of the view that the application would have been approved anyway even if the respondent was not present, and in such circumstances there would have been no fault attributed to the respondent.

Again, with respect to the CA, on the facts of the present case, there is not an iota of evidence to suggest that such application would have been approved even if the respondent was not present. It is mere conjecture on the part of the CA. It is not for us to speculate if such remarks as mentioned above could have erroneously influenced the minds of the CA judges when deciding on the sentence.

In its judgment appearing at pp. 13 and 14 of vol. 1 of the Appeal Record, the CA drew a distinction between the acts of corrupt practices in the case of *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215, and that of the present case. In the former, the CA regarded the corrupt practices of the accused as a threat to public order of the country whilst in the present case, the corrupt practice of the respondent was merely in not recusing himself from the meetings which deliberated and approved the applications of the said land.

Apart from understating the role played by the respondent, which we have adverted to earlier, what the CA had failed to consider is that both cases involve the abuse of office or powers of members of the administration or public officers. It cannot be gainsaid that the very purpose for which the Ordinance was designed is to curb corrupt practices of members of the administration which could by itself threaten the security of the country.

We may add that every form of corrupt practice that falls within the definition of the Ordinance is a threat to national security. Hence, the conduct of the respondent and his conviction of the charges under the Ordinance are *ipso facto* threats to the security of the country even though they are not threats to public order, a factor which the CA had overlooked in its judgment.

We shall now refer to p. 14 of Volume I of the Appeal Record, where the CA stated thus:

> Kami tidak fikir berdasarkan fakta dan keadaan dalam kes ini, hukuman penjara perlu dijatuhkan. Pertama, kesalahan ini tidak patut disamakan dengan kesalahan-kesalahan jenayah merompak, pecah amanah, merogol dan sebagainya dan orang yang melakukan kesalahan ini tidak patut diklasifikasikan bersama-sama penjenayah-penjenayah itu.

In English

> Based on the facts and circumstances in this case, we are of the opinion that a sentence of imprisonment should not be imposed. Firstly, this offence should not be equated with other criminal offences such as robbery, breach of trusts, rape and others and the person who commits this offence should not be classified together with such criminals.

Any offence, be it murder, rape, robbery or corruption is viewed as an offence against society and the community at large. By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery, criminal breach of trust etc., the CA has certainly underplayed the effect of corruption in our society. The offence of corruption, if unabated or undeterred, is more far – reaching in its consequences than the crimes of robbery, criminal breach of trust or rape. Thus, we feel that the sentences imposed for offences of corruption should be deterrent in nature so as to reflect the gravity of the offences.

In order to appreciate and understand the legislative intent of the Ordinance, we feel it is pertinent to refer to the decision of the Federal Court ("FC") in *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230 where the court held (at p. 246):

> We think we have first to examine the object of Emergency (Essential Powers) Ordinance No. 22 of 1970. In *Public Prosecutor v. Datuk Tan Cheng Swee & Ors.* [1979] 1 MLJ 166, 178 this court had occasion to consider the object of Ordinance No. 22 of 1970 and said:
>
> > We consider that our view accords with sound common-sense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act.
>
> It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage.

The FC then dismissed the appeal of the first appellant and confirmed the conviction and sentence of seven months imprisonment imposed by the High Court.

In *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276, the first respondent was earlier charged in the High Court for an offence of using his public office for his pecuniary advantage under s. 2(1) of the Ordinance. At the close of the case for the prosecution, he was acquitted and discharged. (See [1979] 1 MLJ 166). On appeal by the PP, the FC allowed the appeal and before passing sentence this is what the FC said (at p. 279):

> But the offences are very serious ones and carry a sentence of imprisonment not exceeding fourteen years or a fine not exceeding $20,000.00 or both such imprisonment and fine. Surely this country and the public must have a right to expect of its public officers a duty to conduct themselves, at all times, with the highest standards of probity and honesty and in accordance with the law. Anything less will inevitably result in loss of confidence in public administration and in the spread of the cancer of corruption in the lower levels.
>
> Nevertheless, the trial court and this court must consider that the plans submitted were in accordance with or within the permissible dispensations of the bye-laws, the technical advisers had recommended their approval and if Datuk Tan had correctly advised himself to disqualify himself and to refer the plans to the State Authority for his action, the plans would have been passed. By not doing so he had clearly committed the offences with which he was charged but in the circumstances the pecuniary or other advantage which had accrued to him by his passing the plans was perhaps, as a matter of criminal culpability and consequence, less substantial than the case of a public officer who had pocketed money to which he had not any vestige or right to expect or demand.
>
> In these circumstances and having regard to the unfortunate course in which this trial had been held, we do not propose to impose a sentence of imprisonment which, *prima facie*, is appropriate to an offence of corruption or corrupt practice, especially in high places.

The FC then imposed a fine of RM2,000 on each of the charges on which the first respondent had been convicted.

Next, we shall refer to the case of *Nunis v. Public Prosecutor* [1982] 2 MLJ 114. In this case, the appellant, the Penang State Fire Chief, recommended to the Chairman of the Lembaga Pengurus Kerajaan Tempatan, the purchase of certain equipment from a firm wholly owned by his brother-in-law at a price higher than the price for which they could be obtained from another firm. He was charged under s. 2(1) of the Ordinance but was acquitted by the President of the Sessions Court,

Penang. On appeal, Abdul Hamid FJ (as he then was) set aside the order of acquittal and substituted an order of conviction and before passing sentence, the learned judge had this to say (at p. 118):

> In passing sentence I have taken into consideration the submission made by Mr. Balasundram counsel for the respondent, in his plea for mitigation, that the respondent was arrested in 1976 and the charge has been hanging over his head for at least six years and also the fact that all this while the respondent has been interdicted from service.
>
> It must however be observed that the respondent has committed a very serious offence. Perhaps it would also be appropriate to say that if there is a hope for the country to have a clean and efficient administration it is essential that members of the administration should not be corrupt. Offences for corrupt practice committed by a public officer, Members of Parliament and Assemblymen must therefore be dealt with severely. Public interest demands it.
>
> In the case of the respondent I consider the fact that this case has dragged on for some years and that he has, undoubtedly, suffered quite a lot. Nonetheless it would be against public interest if he should be let off lightly. I therefore consider it appropriate to impose imprisonment for 24 months.

The next relevant authority to look at would be the case of *Public Prosecutor v. Dato' Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245. In this case, the accused was at all material times a member of the Kedah State Executive Council. He made an application for land and was allotted a piece of land. The application was approved by the Land Committee and then forwarded to the Executive Council. At the meeting of the Executive Council which approved the application, the accused was present. The accused was charged with the offence of corrupt practice under s. 2(1) of the Ordinance.

In the course of his judgment (at p. 247), the learned judge, Hashim Yeop A Sani J (as he then was) said:

> Coming back to the fact of this case, to put it simply, the act complained of in the charge is that while being a member of the Administration the accused took part in a decision in which he was interested. From the definition of "corrupt practice" it is clear that what the law aims to strike at is any act done by a member of the Administration or public officer whereby he has used his public position or office for his pecuniary or other advantage. In other words the law aims to strike at every act of a member of the Administration or public officer which amounts to an abuse of his

> public position or office for his personal advantage. The definition extends the scope of the law to include any act which is contrary to the provision of subsection (8) of section 2 of the Eighth Schedule to the Federal Constitution or the equivalent provision in a State Constitution.

Further, at p. 248, his Lordship continued:

> A number of witnesses both prosecution and defence said that they took no objection to the presence of the accused. In my view the fact that no one took objection to the presence of the accused at that meeting does not alter the position in law. Nor the fact that according to some witnesses his presence would have made no difference whatsoever and that the application would have been approved any way.

And further, at p. 249:

> The aim of Ordinance 22 is to bring to book renegade politicians and public servants who abuse their public positions for private gains. I agree that there are extenuating circumstances in this case. ...
>
> But an offence has nevertheless been committed. On the facts I can come to no other conclusion but that the accused took part in making the decision which benefited him personally and that in essence is the very thing which Ordinance 22 prohibits.

The accused was convicted and sentenced to a day's imprisonment and a fine of RM2,000 in default six months.

The next authority which merits our attention is the case of *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2002] 3 CLJ 457. The appellant, a former deputy prime minister of Malaysia, was tried in the High Court on four charges of corrupt practice under s. 2(1) of the Ordinance to wit, that he had, whilst being a member of the administration, unlawfully used his public position to his advantage by directing two senior police officers to obtain four written statements from one Azizan Abu Bakar and one Ummi Hafilda Ali denying their earlier accusations of sexual misconduct and sodomy against him, thereby saving himself from embarrassment and possible criminal proceedings. The trial judge convicted and sentenced him to six years imprisonment on each of the four counts with the sentences running concurrently from the date of his conviction (*PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 HC). The appellant's instant appeal to the FC was from the judgment of the CA (*Dato' Seri Anwar Ibrahim v. PP* [2000] 2 CLJ 695 CA) affirming the decision of the trial judge in respect of both conviction and sentence.

The FC dismissed the appellant's appeal against both conviction and sentence. Touching upon the appeal against sentence this is what the FC had to say (at p. 494):

> It is of the utmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence. See *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 257.

The FC then cited the case of *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 and found themselves in full agreement with the statement of principle enunciated in that case.

Finally the FC concluded thus:

> After considering the reasons given by the learned judge, we are satisfied that the imposition of the sentence of six years' imprisonment to commence from the date of conviction has not occasioned an error of principle or law. Therefore, we see no reason to interfere with the exercise of discretion vested in him.
>
> Accordingly, we dismiss the appeal against sentence.

We have said earlier in this judgment that no distinction should be drawn between this case and the instant case before us as both involve the abuse of office or powers of a member of the administration or public officer.

Finally, we shall now look at the case of *Public Prosecutor v. Datuk Hj. Sahar Arpan* [1999] 3 CLJ 427. The accused here faced three charges of having committed corrupt practice pursuant to s. 2(1) of the Ordinance.

The accused in this case is the former ADUN for Durian Tunggal and a member of the MMK Melaka. Sometime in February 1994, the accused, already an ADUN and a member of the MMK, bought a company called Ivory Heights Sdn. Bhd. ("Ivory Heights"). Ivory Heights had sought to carry out an aquaculture project in Melaka and for that had applied for two parcels of state lands in Bertam and Bachang respectively (the said land). On 7 September 1994, the MMK deliberated on the application and approved the same. Thereafter, Ivory Heights applied to change the lease of the said land from 60 years to 99 years, and the MMK, having deliberated on the matter on 21 December 1994, accordingly extended the lease period of the said land. Ivory Heights then applied to expand the approved area of the land in Bertam from 3.3718 hectares to 3.6204 hectares and the land in Bachang from 6.8230 hectares to 7.2019 hectares.

Again, the MMK following its meeting and deliberations on 23 August 1995, approved the said Ivory Heights' application. The facts showed, however, that the accused, in his capacity as an MMK member, was present at all the three MMK meetings aforesaid, and had never declared his interest in Ivory Heights nor left the meeting room at all relevant times. The facts also evinced that Ivory Heights, or the said land, was subsequently disposed off by the accused, with the result that at least RM500,000 had passed hands and been paid to the accused.

The accused was convicted on all the three charges and was sentenced to two years imprisonment and RM20,000 fine in default six months imprisonment on each charge. The imprisonment sentences were to run concurrently.

As a source of guidance, it will not be complete if we do not refer to the case of *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 where that learned judge Hashim Yeop A Sani J (as he then was) had occasion to say:

> In respect of sentencing there can be only general guidelines, No two cases can have exactly the same facts to the minutest detail. Facts do differ from case to case and ultimately each case has to be decided on its own merits. In practice sentences do differ not only from case to case but also from court to court. All things being equal these variations are inevitable if only because of the human element involved. But, of course, there must be limits to permissible variations.
>
> The principles to be applied in imposing sentence however are the same in every case.

In considering the principles of sentencing, Lawton LJ in *R v. Sargent* [1974] 60 Cr. App R 74 at p. 77 held:

> Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.
>
> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

With the above principles in mind and having considered some of the examples of sentences handed down by our courts for offences under s. 2 of the Ordinance, it is now encumbent upon us to identify the right sentences in this case.

It is obvious from the facts that by his role in the entire episode, both the respondent and his wife had benefited financially.

From the sequence of events that took place ie, from the inception of Teraju Nusantara, the application and approval of the said land for quarry purposes and finally the sale of Teraju Nusantara, it is obvious that it was a well thought out scheme by the respondent. There is clear evidence of premeditation on his part to commit a corrupt act. It was not as though the offence was committed in a moment of aberration or on the spur of the moment.

The parts played by the respondent in his capacity as an ADUN and a member of the MMK in the series of meetings held to consider and approve the application of Teraju Nusantara for quarry operations show in no uncertain terms that financial advantage was foremost in the mind of the respondent. This fact is clearly supported by the evidence of the sale of the said land to Hanro Bina five months after the final approval was obtained. The sum of RM150,000 was paid to the respondent during the negotiations. Herein lies the lure and greed.

In our opinion, in cases of corruption it is difficult to envisage a situation where public interest does not require the principle of deterrence to predominate. In *Lim Poh Tee v. Public Prosecutor* [2001] 1 SLR p. 674, it was held that the principle of deterrence dictated that the length of the custodial sentence awarded had to be a not insubstantial one in order to drive home the message that such offences would not be tolerated; but not so much as to be unjust in all the circumstances of the case. In this regard, the culpability of the offender, the circumstances of the offence, the aggravating and mitigating factors, and the sentences imposed in similar cases would be relevant considerations.

Reverting to the present appeal before us, it is our view that very little emphasis has been placed by the CA in their judgment on the aforesaid principles of sentencing.

The CA had placed much emphasis on the fact that the respondent's political career is destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. With respect, these are by no means extenuating circumstances which could attract sympathy.

These in fact are considerations that the respondent should have in mind before he embarked upon this nefarious scheme and they certainly should not have an overwhelming effect on the sentencing process as held by the CA.

As we have quoted earlier in this judgment, the aim of the Ordinance is to bring to book renegade politicians and public servants who abuse their positions. The effect of any punishment imposed is to deter politicians and public servants from conducting their public affairs in a corrupt manner. (See *Public Prosecutor v. Dato' Haji Mohamed Muslim bin Haji Othman, supra*).

It has been held that imprisonment should not be imposed if there is an alternative punishment provided by the legislation in the punishment section. However, it has equally been held that imprisonment may be the only suitable form of punishment despite the provision of an alternative punishment, in view of the gravity of the offence and to serve public interest (See *Kang Yeow Hooi & Ors. v. Public Prosecutor* [1954] 20 MLJ 233).

From the authorities we have considered earlier, there is no doubt that in cases involving corruption, imprisonment would be a proper sentence unless there are extenuating circumstances against the imposition of such a sentence. We find there is none in the present case.

From the factual matrix of this case, it can be seen in no uncertain terms that the respondent, as a politician had, whilst holding a public office of some stature, used his public position to his advantage and obtained a monetary benefit as a consequence of it. The nature of the abuse is in the financial advantage that he gained from the use of his office.

Having said the above, it is our unanimous decision that this appeal be and is hereby allowed. We would therefore set aside the sentences of fines imposed by the CA and in place substitute a sentence of two (2) years imprisonment on each amended charge. The sentences are to run concurrently. The fines, if paid, are to be refunded to the respondent.

My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it.